

Elmo Greer & Sons, Inc. and William Watkins.
Case 9-CA-29227

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On November 4, 1992, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that on July 15, 1991, the Respondent's foreman, Bentley, implied in a conversation with Charging Party Watkins that the Respondent intended to terminate Watkins if he did not cease his union activities and that, on the following day, the Respondent laid off Watkins in violation of Section 8(a)(3). As to the first allegation, the judge credited Bentley's testimony that he told Watkins that General Superintendent Pennington was "on my ass" about Watkins' accidents. Watkins had had several accidents during the course of his employment, including tipping over a bulldozer for the second time earlier that day. Bentley had previously counseled Watkins about his accidents on several occasions. On the day in question, Bentley told Watkins that Pennington might fire him on that account. The judge discredited Watkins' testimony that Bentley told him Pennington was looking for an excuse to fire him (Watkins) and that he had better drop the Union. Instead, the judge credited Bentley's denial that he said anything to that effect and therefore dismissed the 8(a)(1) allegation.¹ The judge further concluded, however, that the Respondent violated Section 8(a)(3) when it laid Watkins off. The judge applied a terse *Wright Line* analysis.² He found that laying off one man while keeping the rest of the crew at work was unusual and had not been satisfactorily explained. He noted that although Bentley testified there was not enough work for four men, the seed crew received help from the fencing crew and Bentley, in a departure from past practice, spent about half his time working as a crewmember.

The Respondent in its exceptions asserts that the judge erred in finding a violation in the Watkins' lay-off and argues that the complaint should be dismissed in its entirety. We find merit in the Respondent's exceptions.

The Respondent is engaged in highway construction in Kentucky and surrounding States with a normal work force of about 250 to 300 employees, which is augmented during busy times. The Respondent is a member of the Highway Contractors' Inc., which negotiates with the Steelworkers Union on behalf of its members. The collective-bargaining agreement covers the unit of employees basically engaged in preparing the roadbed and building the highway, but does not include those employees who put up guard rails, erect fences, or perform seeding operations. Watkins was employed on the seeding crew. Watkins had been employed by the Respondent on and off for several years. He had been laid off on earlier occasions, and in 1990 had quit and been off for several months. After returning to work, he suffered an off-the-job injury which kept him out of work until April 1991. In July 1991 members of the seeding crew, including Foreman Bentley, discussed among themselves contacting the Union because of a lack of health insurance. Watkins contacted the union steward, who came to the jobsite on two occasions and, apparently, talked primarily to Watkins. The second time was on July 15. That same day Watkins tipped over a bulldozer for the second time and had the discussion with Foreman Bentley referred to above in which Bentley told him that he might be fired because of the accident.

Assuming for the purposes of discussion that the General Counsel established a prima facie case, we find, contrary to the judge, that the prima facie case was rebutted by the Respondent. Accordingly, we dismiss the complaint.

On July 16, according to Bentley's uncontested testimony, Superintendent Pennington decided that one employee should be laid off from the seeding crew. There was about another week and a half's work left on the project. The seeding crew was running up against the back of the fencing crew and, if they continued as they were doing, the Respondent would have had to lay off the entire crew sooner. Superintendent Pennington originally had identified employee Hatton for layoff because he thought Hatton was the last man hired. Bentley, however, told Pennington that Watkins was the last man hired and that if anybody was to be laid off, it should be Watkins because the Respondent always tried to lay off by seniority. Pennington then agreed and Bentley notified Watkins that evening.

The judge reasoned that the layoff of one man while keeping the rest of the crew at work was unusual and that there was no evidence that the Respondent ever laid off just one man and kept the rest of the crew. The judge's discussion in this regard appears to be derived from the testimony of employee Hatton. But Hatton's testimony concerned layoffs before bad weather or in the winter when the Respondent did not work. Indeed, the judge did not reconcile Hatton's further

¹ There is no exception to this dismissal.

² 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

testimony in accord with that of Bentley that 1 week after Watkins was laid off, Hatton himself was laid off while the rest of the seeding crew spent a few days at another project. Thereafter, the rest of the crew, including Foreman Bentley, was also laid off.

The judge also found that after Watkins' layoff, Bentley spent about half his time working as a crewmember and that that was a departure from past practice. He concluded, therefore, that there was in fact work for the entire crew after Watkins' layoff. We note that the judge's statement fails to take account of Hatton's testimony, discussed above, that, he was laid off while the rest of the crew continued to work. We also find that the judge misconstrued Bentley's own testimony.

Bentley testified that as a matter of normal routine he performed some seed crew work such as operating the straw bar, the dozer, the lime truck, or the straw truck. When asked whether he worked alongside the seed crew at the Louis County project, Bentley testified that he usually ran a seed sower; most of the time he ran a straw blower. When asked how much of his workday he spent running the seed sower and the straw blower, he answered, "oh, about half a day, I guess." Thus, although it appears that he spent some additional time working with the crew at Louis County, Bentley's testimony does not support a conclusion that there was full-time work for an additional employee; indeed it suggests the converse.

The judge found that if Watkins' layoff had been due to lack of work then he would have been recalled by the summer of 1992, and he inferred from this evidence an intent to discharge Watkins. We note, however, that there is no allegation of a discriminatory failure to recall Watkins during the summer of 1992. Further, when the Respondent's counsel, after examining Seed Crew Foreman Bentley about activities of the seed crew in 1991, asked about Bentley's experience with the seed crew since January 1992, counsel for the General Counsel objected on the ground that it was not relevant to issues raised by the complaint.

Although at least Bentley was aware of the seed crew's discussions concerning a lack of health insurance with the union steward, there is no evidence in this record to suggest union animus. Indeed, the only independent allegation in that regard was dismissed by the judge on credibility grounds. We find that the layoff of Watkins as the junior member of the crew was in accord with past practice, as was Hatton's layoff shortly thereafter as the next junior crewmember. Bentley's testimony that the seed crew at that time was "running up against the fencing crew" and would therefore otherwise require earlier layoffs of the entire crew is uncontradicted.

We conclude based on the foregoing, and assuming that the General Counsel presented a *prima facie* case,

that the case was rebutted by the Respondent, which demonstrated that Watkins was laid off for lawful economic reasons and not for engaging in union activities.

ORDER

The complaint is dismissed.

Eric V. Oliver, Esq., for the General Counsel.

James U. Smith, Esq., of Louisville, Kentucky, for the Respondent.

William Watkins, pro se.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on June 10, 1992, at London, Kentucky, on the General Counsel's complaint which alleged that on July 16, 1991, the Respondent laid off the Charging Party from his employment in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

The Respondent generally denied that it engaged in any unfair labor practices. Although admitting that the Charging Party was laid off on the date alleged, the Respondent contends the layoff was the result of a lack of work. The Respondent further contends that this complaint is barred by Section 10(b) of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is alleged, admitted, and I find that the Elmo Greer & Sons (the Respondent or the Company) is engaged in highway construction and road building out of its London, Kentucky facility and in furtherance of this business, it annually purchases and receives at London, Kentucky, directly from points outside Kentucky, goods valued in excess of \$50,000. At all times material, the Respondent has been an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I find, that United Steelworkers of America, Local 14581, AFL-CIO-CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

The charge here was filed on January 14, 1992, and mailed to the Respondent by certified mail on January 16, 1992. Because the Charging Party was laid off on July 16, 1991, the Respondent contends this matter is barred by the limitation period of Section 10(b).

The Respondent acknowledges that for purposes of determining the 10(b) period, the first day is the day after the event, or July 17. *MacDonald's Industrial Products*, 281 NLRB 577 (1986). The Respondent further acknowledges that service of a charge is the day when it is put in the United States mail. *St. John Medical Center*, 252 NLRB 514 (1980).

Counsel for the Respondent contends, however, that this matter is time-barred because more than 180 days elapsed

between July 17, 1991, and January 16, 1992. Although true, 180 days is not 6 months. Section 10(b) specifically states the limitation period to be "six months." The charge here was filed within and served on the last day of the 6-month period following the event alleged. Accordingly, the Respondent's defense that the limitation period of Section 10(b) had run is rejected.

II. THE FACTS

The Company is engaged in highway construction in Kentucky and surrounding States. Its normal work force of about 250 to 300 is augmented during busy times to 450 to 500. The Company is a member of the Highway Contractors, Inc., which negotiates with the Union on behalf of its members. The collective-bargaining agreement covers a unit of employees who, basically, are engaged in preparing the road bed and building the highway. Excluded are other employees.

Among the employees excluded from the bargaining unit are those who work on the seeding crew. At all times material, the seeding crew consisted of four employees and a foreman, Edward Burton Bentley.

The seeding crew comes onto a project at the end, following the fencing crew. As the name implies, the seeding crew plants grass on the median strips and right-of-ways. This work is somewhat seasonal and the crew moves from project to project, depending on the state of completion.

William Watkins, the Charging Party, has worked for the Respondent since 1984; however, he had a break in service from mid-July until October 1, 1990. This was caused by his quitting his employment. He was twice called to return to work because the Company needed another person on the crew and he had experience and necessary skills. The first time he declined, the second he accepted. After returning, he suffered an off-the-job injury which kept him out of work until April 1991.

In July members of the seeding crew concluded that they were being mispaid, their rates being set by some kind of a board pursuant to a prevailing wage law. They took this up with Bentley who referred them to the Respondent's general superintendent, Junior Pennington. He told them the scale board was wrong.

Shortly thereafter, members of the seeding crew discussed among themselves, but apparently in the presence of Bentley, that they ought to contact the Union because of their lack of health insurance. These discussions took place at night, apparently at the place where all but Billy Hatton were staying. Hatton drove home each night. The others, including Bentley, stayed near the job.

Pursuant to the employees' discussions, Watkins contacted the Union's steward, who came to the jobsite twice. The first time was on or about July 11, the second was Monday, July 15. The steward talked primarily to Watkins.

On July 15, Watkins had another accident, and for the second time tipped over a dozer. Although no damage was done, Bentley did tell Watkins "Junior is done already on my ass and he will be after your ass if you have another accident." Watkins testified that Bentley said that Pennington was looking for an excuse to fire him and that he had better "drop the Union."

According to Bentley, the next day Pennington said to lay off one man, naming Hatton because he was the junior employee. Bentley told Pennington that Watkins was junior, be-

cause of his break in service, and Pennington said to lay him off.

The rest of the crew then went to another job and worked a couple weeks then, according to Bentley, Hatton was laid off and the rest of the crew worked another week or so. Hatton testified that the entire crew was laid off when he was and they were off work about 6 weeks. In any event, when the crew returned to work, Watkins was not recalled. Bentley testified that Pennington said if they needed more help, they could get it from the fencing crew.

Though the Respondent contends that Watkins is merely on layoff, to the time the hearing he had not been recalled.

III. ANALYSIS AND CONCLUDING FINDINGS

A. *The 8(a)(1) Allegation*

It is alleged that on July 15, 1991, Bentley implied that the Respondent intended to terminate an employee (Watkins) if he did not cease his union activities.

Inasmuch as this event allegedly occurred more than 6 months before the service of the charge, it is barred by Section 10(b) of Act. Accordingly, no order based on this alleged threat can be issued.

However, because this incident is also offered as evidence of the Respondent's discriminatory motive in laying off Watkins, findings concerning it must be made.

Both Bentley and Watkins testified to the discussion they had following the dozer accident on July 15. Watkins testified that Bentley told him that Pennington was looking for an excuse to fire him and that he had better drop the Union. Bentley denied this, or anything to its effect. And he seemed credible in doing so.

Bentley testified that Pennington was "on my ass" and would be on Watkins' as well if he had another accident. Watkins had had several during the course of his employment, including twice tripping over the dozer. Bentley's version of this discussion was credible and plausible.

I therefore conclude that Bentley did not threaten Watkins with discharge should he continue his union activity. Such, however, does not negate a discriminatory motive when Watkins was laid off.

B. *The Layoff of Watkins*

There is evidence that when the union steward came to the jobsite and talked to Watkins, this was observed by Bentley. And Bentley did not deny seeing the steward talk to Watkins on two occasions, including the day before Watkins' layoff. Beyond that Bentley testified that the crew discussed the Union because they were concerned about the lack of health insurance. Thus the union activity of Watkins and the seeding crew employees was known by their supervisor and, I infer, by Pennington.

Within a few days after the employees began discussing the Union and talked to the Union's steward, Pennington instructed Bentley to lay off one man. This turned out to be Watkins, who was indisputably the junior employee on the seeding crew. However, because he could drive a truck and operate the dozer, he had skills which Hatton did not.

Although all the seeding crew employees were involved in discussing the Union, clearly Watkins took a leading role, contacted the Union's steward and talked to him at the job-

site. This was known to Bentley, and I infer, to Pennington in absence of any evidence to the contrary.

Although the seeding crew is laid off from time to time when work runs out, there is no evidence that the Respondent ever laid off just one man and kept the rest of the crew working. Although the testimony is general and vague, it appears, and I find, that the Company's practice is to have a four-man seeding crew with a foreman who spends substantially all his time with supervisory duties; and, when a layoff is necessary due to lack of work, the entire crew is affected. Sometimes when work is resumed, at first the foreman and two employees are called back.

On this record, I conclude that the layoff of one man while keeping the rest of the crew at work is unusual. Although Bentley testified that there was not enough work for four men, he also testified that the crew was helped by employees on the fencing crew. And he testified that after Watkins' layoff, he spent about one-half his time working as a crew member, which was a departure from the practice. From this I conclude that there was in fact work for the entire crew subsequent to the layoff of Watkins.

This unusual layoff by the Respondent, within days of the employees' union activity, leads me to conclude that the General Counsel established prima facie that the layoff of Watkins was discriminatorily motivated. That their interest in the Union was the causative factor is further supported by the fact that this activity came shortly after the employees, with Watkins leading, protested their pay.

Therefore, the burden was on the Respondent to prove that it would have laid off Watkins even in the absence of his and the other employees' union activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). I conclude that the Respondent did not carry its burden.

Pennington did not testify. Bentley did not explain why it was necessary to lay off one man and then get help from the fencing crew. He did testify that with a four-man crew, they would have pushed against the fencing crew, but this was rather general and unpersuasive testimony. He offered no facts or other evidence to support it. There is simply no evidence why in mid-July 1991 the Respondent decided to use a three-man rather than a four-man seeding crew. Absent some evidence of why Pennington determined to change the basic crew manning, I conclude he would not have done so if the employees had not demonstrated an interest in the Union.

If the layoff of Watkins had simply been due to lack of work, as the Respondent contends, then it would be expected that at least by the summer of 1992, he would have been recalled. He was not. This suggests that the Respondent's intent was to discharge Watkins. Because no reason was given I must conclude that the intent was to discriminate against him because of his and others' union activity. Accordingly, I conclude that the Respondent violated Section 8(a)(3) of the Act.

REMEDY

Having concluded that the Respondent engaged in unfair labor practices, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action.

Because the Respondent laid off William Watkins in violation of Section 8(a)(3) and (1) of the Act, I recommend that it be ordered to offer him reinstatement to his former job and to make him whole for any loss of wages or other benefits he may have suffered as a result of the discrimination against him, with interest. *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]